

CPLR 5704(b): Amendment

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Conference recommended the insertion of this provision. This subsection vests in the appellate court the discretion, when the interests of justice so demand, to treat as valid and effective a notice of appeal which is either premature or which contains an incorrect description of the order or judgment appealed from.

ARTICLE 57 — APPEALS TO THE APPELLATE DIVISION

CPLR 5704(b): Amendment.

This amendment eliminates a limitation on the general appellate power of the appellate term in the first and second departments. Prior to the CPLR, the appellate term could hear *ex parte* orders under their rules only from expressly enumerated courts. The original CPLR section limited the hearing of *ex parte* orders to the Civil Court of the City of New York. The new amendment eliminates this limitation, and provides that the appellate term may review such orders made "by any court or a judge thereof from which an appeal would lie to such appellate term . . ."

ARTICLE 62 — ATTACHMENT

CPLR 6212: Recovery for legal services allowed in wrongful attachment when there is inducement and causation.

Upon a motion for an order of attachment, the moving party is required to furnish an undertaking promising to pay all of the defendant's legal fees sustained by reason of the attachment "if the defendant recovers judgment or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property . . ." ¹⁰² The present wording of the statute was employed by the revisers to make clear that "the undertaking is not to be used to pay the defendant if an attachment is vacated for merely technical defects . . . [or where] it is no longer necessary." ¹⁰³ Where, however, the cause of action, as a matter of law, did not furnish a basis for a warrant of attachment, the defendant cannot later recover the cost of legal services in vacating the attachment. ¹⁰⁴ The reason for this rule is that the defendant should not recover his legal costs where he has proceeded to defend on the merits and thereby incurred additional expenses if the attachment could have been vacated by motion. ¹⁰⁵

¹⁰² CPLR 6212(b); see 7 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 6212.07-08 (1965).

¹⁰³ THIRD REP. 341.

¹⁰⁴ *Olsen v. United States Fid. & Guar. Co.*, 230 N.Y. 31, 128 N.E. 908 (1920). This was an equity action to compel specific performance of a contract for money damages, whereas plaintiff is entitled to an order of attachment only in an action for a money judgment.

¹⁰⁵ *Id.* at 36; 128 N.E. at 909.